



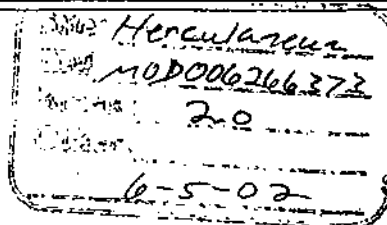
SUPERFUND RECORDS

## MEALEY'S LITIGATION REPORT

**Lead**

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Furthermore, the court "disregarded the Rule of Reasonableness in ignoring Local Law 38's elimination of protections for 6-year-olds," the plaintiffs argue.

The plaintiffs contend that the court also disregarded the rule of reasonableness regarding Local Law 38's deregulation of lead dust in connection with impact, friction and child accessible surfaces.

### ***Council's 'Compliance'***

The appeals court had ruled that the record "amply demonstrated" city council's compliance with the applicable environmental laws and said, "it is undisputed that the policy should be containment rather than removal of lead paint because removal poses a greater threat than containment."

Because Local Law 38 is premised on containment rather than removal, the court said the petition to replace it with Local Law 1 should be dismissed.

Nullification of Local Law 38 would put the city in immediate contempt and leave it without effective and safe methods of dealing with persistent lead hazards, the court added.

### ***Negative Declaration***

The appeals court said the judicial proceeding regarding the petition "has never been the forum in which a decision should or could be made regarding the best public health measure for protecting children from lead-based paint."

Rather, the court said, the public health function belongs to the New York City Council, where it must remain.

City council adopted a negative declaration in the process of approving Local Law 38, relieving it of the obligation to perform an EIS.

The appeals court said: "Where, as here, governmental action concerns remedies for existing environmental harm, it is important to keep the existing harm separate from the governmental action. The government had not been made responsible for environmental risks created by third parties as a result of [SEQRA]."

### ***Experts***

The rationale for moving from a total removal to containment approach was explicitly addressed by experts whom the court said support the negative declaration's finding that no significant adverse environmental effect would result from Local Law 38.

The court said that if it adopted the advocates' view of the negative declaration, that would "grant petitioners the political victory they failed to achieve in the legislative forum."

"Critical to our analysis is the undisputed fact that total abatement, the underlying premise of Local Law 1, had proven itself over two decades to be an unintended health hazard," the court said.

The Northern Manhattan Improvement Corporation is represented by in-house counsel Kenneth Rosenfeld, Matthew Chachere, Theodora Galacatos and James M. Baker. The New York Public Interest Research Group is represented by in-house counsel Andrew Goldberg. ■

## ***Lead Smelter: Lead Levels On Residential Streets Not A Hazard; EPA Skeptical***

ST. LOUIS — The Doe Run Resources Corp. announced May 13 that its independent investigation of the health risks associated with the lead levels on residential streets in Herculanum, Mo., concluded that the lead concentration on the streets used to transport lead to its smelter posed "no significant health risks."

A source with the U.S. Environmental Protection Agency said he was concerned that the samples used in the study are not representative of the street dust in Herculanum (See next story).

### ***Lawsuit Filed***

Doe Run faces litigation over allegations its lead smelter has caused lead poisoning (Grace

Warden, et al. v. The Doe Run Resources Corp. et al., No. CV-301-5849-CCJ2, Mo. Cir., Jefferson Co.; See 10/17/01, Page 10).

Robyn Warden, on behalf of Grace and Aaron Warden; Marvin Becquette; Rebecca Robinson, on behalf of Craig Robinson 2d and Michael Robinson; Dustin Rhodes; Gregory Bieber, on behalf of Dylan Bieber; Delba Sue Dawson, on behalf of Thomas and Christina Dawson; Richard Dawson; Melissa Alexander, on behalf of Preston Alexander; Carol Miller, on behalf of Jesse and Jonathan Miller; Rachel Pederson; Aimee Zeller; and Amy Pouvaranukoah sued the Doe Run Resources Corp., The Renco Group Inc., Fluor Corp. a/k/a Fluor Acquisition Corp., St. Joe Minerals Corp., Doe Run Investment Holding Corp., Leadco Investments Inc., A.T. Massey Coal Co. Inc. and Homestake Lead Co. of Missouri, alleging injuries from exposure to lead and other metals.

The complaint seeks damages for negligence, strict liability for ultrahazardous activity, trespass, battery and product liability.

### **Allegations**

The plaintiffs contend that the mining and smelting operations of the Doe Run smelter exposed residents of Herculanum to lead and other toxic substances.

Doe Run knew or should have known to conform its conduct to the standards of reasonable care and conduct in light of the inherent, apparent and unavoidable risks posed by the lead, metals and other hazardous substances to prevent exposing the plaintiffs to the substances, the plaintiffs claim.

The smelter also should have known that its mining, generating, smelting and processing activities would release lead into the air and into the surrounding land, the plaintiffs argue.

Furthermore, the plaintiffs allege that Doe Run failed to adequately and properly monitor the emissions and release of lead and other toxic substances and failed to warn the public about the dangers of its emissions.

### **Study**

The study is the first scientific research to quantify the level of risk posed by lead ore concentrate on the roads, and was prepared by Teresa Bowers, Ph.D., of Gradient Corp. of Cambridge, Mass.

The study found that exposure to lead ore concentrate in street dust currently measured is not expected to have any significant or lasting effect on blood-lead levels for children or adults, and a one-time exposure to an unusually high concentration of lead is not expected to have any significant or lasting effect on blood-lead levels of children or adults.

The health risk assessment evaluated lead risks for long-term exposure to a child walking along the haul road and exposed to street dust via ingestion and inhalation of particulates. The study covered current street dust conditions as well as those on Aug. 29, 2001, prior to the haul road remediation program begun by Doe Run. ■

### **Mo. Health Agency: Risk Assessment Not 'Objective'**

ST. LOUIS — The Missouri Department of Health and Human Services (MDHHS), in a letter sent to Doe Run Co. on May 31, disagrees that the company's lead risk assessment is objective and cites alleged errors in Doe Run's methods of analyzing the lead exposure risks associated with the haul road leading to its smelter in Herculanum, Mo. (See previous story).

(MDHHS Letter in Section C. Document #14-020605-107X.)

The letter, sent by Pamela Walker, director of the Missouri Department of Environmental Health and Communicable Disease Prevention,

EMAIL THE EDITOR

email editor **james cordrey** at  
**james.cordrey@lexisnexis.com**

to Doe Run "strongly urges citizens of the community to continue to act with caution along haul routes, as it is likely that children and adults also are being exposed to other sources of lead every day."

The MDHHS cites three "key areas of uncertainty" with the conclusions reached in Doe Run's Haul Road Risk Assessment (HRRR), including the use of unapproved toxicity and exposure assumptions, modifications to a U.S. Environmental Protection Agency (EPA) model which have not been validated and the use of an unapproved lead exposure model.

### **HRRR**

The HRRR analyzes only one set of intake and bioavailability assumptions and contains little discussion of the impact of variability and uncertainty in the data that was substituted for EPA's default assumptions, MDHHS argues.

"The measurements and modeling fail to account for lead dust that is transported by the forces of wind and precipitation from the haul route source area to other exposure locations, such as yards and homes," the letter states.

The MDHHS says it suggests that the assessment should have included a sensitivity analysis — a specialized examination of the input parameters which disclose the impact of key assumptions on the results and conclusions of the analysis.

### **IEUBK Model**

The HRRR calculates a "predicted incremental increase" in the blood-lead level for a child with limited daily exposure to lead contaminated street dust, which the MDHHS contends is a "non-standard approach" to the Integrated Exposure Uptake Biokinetic (IEUBK) model.

The method used in the HRRR "is not described in the EPA guidance and should probably be reviewed" by the EPA's Technical Review Workgroup for lead, the MDHHS asserts.

"MDHHS respectfully suggests that a truly objective, reasonable approach to assessing the

impact of lead road dust on a population already at risk is to integrate site-specific environmental samples of soil, water, food and air samples collected in Herculaneum, running the model with and without the street dust included as a fraction of the total soil ingestion," it says. ■

## **Groups Allege \$13 Million Mismanaged In Albany, Plan To File Lawsuit**

ALBANY, N.Y. — Charging the City of Albany "squandered" \$13 million in federal money slated for remediating lead hazards, two groups are planning a lawsuit against three city officials, a source told Mealey Publications May 28.

The Natural Resources Defense Council (NRDC) and the Arbor Hill Concerned Citizens (AHCC) are preparing a complaint which will name Gerald D. Jennings, George Leveille and Joseph Montana with "gross mismanagement" of a program designed to reduce children's exposure to the dangers of lead paint.

Jennings is Albany's mayor, Leveille is the commissioner of the city's Department of Development and Planning and Montana is the director of the city's Community Development Agency.

### **Relief Sought / Allegations**

The lawsuit, which will be brought under the federal Toxic Substances Control Act, requires a 60-day notification before the complaint is actually filed. The NRDC and AHCC seek to halt the city's alleged violations and force it to ensure that "improperly abated homes" are safe for residences.

The groups claim that since 1995, Albany has received \$13 million from the U.S. Department of Housing and Urban Development, but the city did not follow federal guidelines in performing the lead abatement.

The City of Albany, the NRDC contends, "consistently" used lead workers who had not been